RECEIVED
AUG 12 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5227

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHERYL MAFFEY

v.

STATE OF OREGON ex rel JUVENILE DEPARTMENT OF KLAMATH COUNTY

On Appeal From the Court of Appeals of Oregon

JURISDICTIONAL STATEMENT

JAN L. PERKINS
Oregon Legal Services Corporation
Klamath Falls Regional Office
432 Main Street, Suite 205
Klamath Falls, OR 97601
503-884-7709

Counsel for Appellant

July 1980

QUESTION PRESENTED

Is the Oregon statute, which permits the permanent termination of the parent-child relationship by the application of the preponderance of evidence standard, violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.	1
STATEMENT OF FACTS	2
THE QUESTION IS SUBSTANTIAL	6
I. THE OREGON STATUTE PERMITTING TERMINATION BY A PREPONDERANCE OF THE EVIDENCE STANDARD IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	6
CONCLUSION	10

TABLE OF AUTHORITIES

Addington v. Texas, 441 U.S. 418 (1979). 7,8

Adoption of J.S.R., 374 A.2d 860 (D.C.1977). . . 10

Alsager v. District Court, 406 F.Supp.10(S.D.Iowa) aff'd on other grounds 545 F2d 1137(8th Cir.1976) 10

Bates v. Little Rock, 361 U.S. 516 (1960). . . . 6

Chaunt v. United States, 364 U.S.350(1960). . . . 7

Dunn v. Blumstein, 405 U.S. 330 (1972) 6

Gonzales v. Landon, 350 U.S. 920 (1955). 7

Hernandez v. State ex rel Arizona Dept. 23 Ariz. App. 32, 530 P.2d 389 (1975). 9

In re G.M., - S.W.2d-, 48 U.S.L.W. 2669(Tex.1980) 9

In re Heidi T., 151 Cal. Rptr. 263 (1978). . . . 9

In re Sego, 513 P.2d 831 (Wash. 1973) 10

In re Terry D., 148 Cal. Rptr. 221 (1978). . . . 10

In re Winship, 397 U.S. 358 (1970). 8

In the Matter of Inquiry into J.L.B., 594 P.2d 1127 (Mont. 1979). 10

In the Matter of K.M.S., 26 Or.App. 219, 552 P.2d 578 (1976). 9

In the Matter of N.J.W., 273 N.W.2d 134(S.D.1978) 9

Page

Matter of C.L.T., 597 P.2d 578 (Alaska 1979). . . 9

Matter of Welfare of Rosenbloom, 266 N.W.2d 888 (Minn. 1978). 9

Nishikawa v. Dulles, 356 U.S. 129(1958). 7

People in the Interest of M.B. and M.B., 535 P.2d 192 (Colo.1975). 10

Roe v. Wade, 410 U.S. 113 (1973). 6

Schneiderman v. United States, 320 U.S. 118(1943) 7

Shapiro v. Thompson, 394 U.S. 618 (1969). 6

Sims v. State Dept. of Welfare, 438 F.Supp.1179 (S.D. Tex. 1977) rev'd on procedural grounds 99 S.Ct. 2371 (1979). 10

Smith v. Organization of Foster Families,431 U.S. 816 (1977). 6

Stanley v. Illinois, 405 U.S. 645(1972). 6,7

State in Interest of Pitts, 535 P.2d 1244 (Utah1975) 10

State v. Blum, 1 Or.App. 409, 463 P.2d 367(1970). 9

State v. Jamison, 251 Or. 114, 444 P.2d 15, 444 P.2d 1005 (1968). 7

State v. McMaster, 259 Or. 291, 486 P.2d 567(1970) 7

Zablocki v. Redhail, 434 U.S. 373 (1978). 6

CONSTITUTION, STATUTES AND RULES

Constitution of the United States:

Fourteenth Amendment. 1,2,5, 6,9,10

Oregon Statutes:

ORS 419.523 1
ORS 419.525 1,2,5

Supreme Court Rule 10(3). 1

28 U.S.C. 1257(2) 1

OPINIONS BELOW

The oral opinion issued by the Trial Court Judge in open court is attached to this Jurisdictional Statement as Appendix A. It was issued April 4, 1979. The Court of Appeals of Oregon affirmed without opinion on March 3, 1980 and declined reconsideration without opinion on April 9, 1980. The Supreme Court of Oregon denied review without opinion on May 13, 1980. These are attached as Appendices B, C and D respectively.

JURISDICTION

This proceeding began in the Juvenile Court for the State of Oregon, County of Klamath. It was brought to terminate Appellant's parental rights to her son, Noel Barefoot Wright, pursuant to Oregon Revised Statutes 419.523 and 419.525. The Order Terminating Appellant's Parental Rights was entered on April 6, 1979, following which a timely appeal was taken to the Oregon Court of Appeals. The Court of Appeals affirmed on March 3, 1980 (Appendix B). On April 9, 1980, the Court of Appeals denied the timely request for reconsideration (Appendix C), and on May 13, 1980, the Supreme Court of Oregon denied review (Appendix D). A Notice of Appeal in this case was filed in the Oregon Court of Appeals on July 28, 1980, and is attached as Appendix E.*/ Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, or U.S. CONST. amend. XIV, §1, reads as follows:

> Citizenship; privileges and immunites; due process; equal protection. All persons born or

---

*/ A copy of the Notice of Appeal was filed on July 24, 1980, in the Juvenile Court for Klamath County because it was the Court possessed of the record. Supreme Court Rule 10(3). A second orginal Notice of Appeal was filed in the Oregon Court of Appeals on August 8, 1980, to ensure the jurisdictional requirements had been met.

> naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oregon Revised Statute 419.525(2) provides as follows:

> (2) A hearing shall be held by the court on the question of terminating the rights of the parent or parents. No such hearing shall be held any earlier than 10 days after service or final publication of the summons. The facts on the basis of which the rights of the parents are terminated, unless admitted, must be established by a preponderance of competent evidence and a stenographic or other report authorized by ORS 8.340 shall be taken of the hearing.

STATEMENT OF FACTS

An order terminating the rights of a parent to his or her child may be issued in Oregon when the substantive and procedural requirements of ORS 419.523 and 419.525 have been met.*/ Such an order permanently terminates all rights of the parent and allows the court to release the child for adoption.

On March 23, 1978, a Petition to Terminate Appellant's Parental Rights to her son, Noel Barefoot Wright, was filed in the Juvenile Department of the Circuit Court of Klamath County. The basis asserted for termination was that Cheryl Maffey suffered from emotional and mental illness which made her unfit by reason of condition seriously detrimental to the child. An Amended Petition was filed August 2, 1978, wherein it was alleged Cheryl Maffey was unfit by reason of conduct and condition seriously detrimental to the child.

At trial the Department sought to show that Cheryl Maffey had a history of frequent institutionalizations and an unstable lifestyle characterized by many changes of residence, repeated

---

*/ These Statutes are represented in Appendix F.

requests for aid from social service agencies, frequent foster care placements for her son and a lack of cooperation with caseworkers. It also sought to show she suffered from chronic schizophrenia and was unable to care for her son and would never be able to do so adequately. It called nine caseworkers from the Children's Services Division, two laypersons and two professionals in the field of psychology and psychiatry. The testimony of the caseworkers covered the years from July, 1972, to April of 1978.*/ No caseworker had contact with Appellant after that time. The basis they gave for termination is best condensed in the testimony given by Appellant's last caseworker at pages 847-849 of the transcript where he stated he sought termination due to Cheryl Maffey's condition and the best interest of the child. A psychologist called by the Department testified psychological tests revealed the child required a stable, secure and consistent home life and exhibited a stunted emotional growth at the time of testing.**/ The psychiatrist called by the Department gave similar testimony and further stated he found, on the basis of a one hour interview, the Appellant to be suffering from chronic schizophrenia.***/

Appellant, in her case, did not dispute she had been in various institutions, had moved frequently and had sought aid from social agencies for herself and her child numerous times. She also agreed she suffered from an illness which made it more difficult for her to cope with herself and her child than if

---

*/ Tr. 230-294, 439-558, 601-909, 1140-1146. Tr. refers to the transcript of the trial held November 27-December 1, 1978 and December 18-December 22, 1978.

**/ Tr. 22, 33-38.

***/ Tr. 307-311, 296-297.

she were not afflicted, although she disputed the finding that she suffered from chronic schizophrenia. She maintained, however, that given the proper supportive services she was capable of adequately caring for her child. On this point her last caseworker apparently agreed with her. (See Tr. 897-898) She sought to show she had never previously been able to find a community where all the necessary supportive services were present on a stable, permanent basis, but that she at the time of trial found herself in such a community and she was ready and able to assume the responsibility for the care of her child.*/

Appellant called her treating psychiatrist who testified he had treated her for seven months and found she suffered from a borderline personality which did not prohibit her from immediately accepting the responsibility for the care of her child provided she maintained proper medical treatment and continued utilizing the supportive services available to her from the Urban Indian Program in Portland, Oregon, and the surrou ing Indian community.**/ He stated the prognosis for the foreseeable future was favorable. Appellant also called three people, a psychiatric social worker, a social worker and a caseworker from Portland's Urban Indian Program, who had worked with her. Each of them told about the supportive services available to Cheryl Maffey and testified that the mother had made a good adjustment in the Indian community in Portland, took good care of her youngest son living with her, and was capable of caring for Noel Barefoot Wright at that time.***/

---

*/ Tr. 45-229, 1101, 1140

**/ Tr. 347-350, 391-392.

***/ Tr. 910-975, 976-992, 1050-1059.

She also called a friend to testify to the lack of permanent supportive aid for her in Klamath County when she lived there. (See Tr. 1080-1091)

During the trial on December 13, 1978, counsel for Cheryl Maffey filed a memorandum of law with the Court in which he asserted a page 6 the Department's burden of proof should be that of 'beyond a reasonable doubt' rather than a 'preponderance of the evidence'. Counsel for appellant thereafter made final argument by submitting a written memorandum to the Court which was subsequently filed on January 29, 1979. At pages 17, 18 and 19 Counsel argued that application of the standard of a preponderance of evidence would deprive Cheryl Maffey of her right to due process under the Consitution of the United States.

On April 4, 1979, the Juvenile Court issued oral findings of fact and a ruling that Cheryl Maffey was "unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home of the parent is improbable in the foreseeable future due to conduct or conditions not likely to change"*/ The Court made this finding based on a preponderance of evidence. On review the Oregon Court of Appeals affirmed without opinion. (See Appendix B) Appellant's first assignment of error in that Court argued the Trial Court erred in applying the standard of proof in ORS 419.525(2) to find Cheryl Maffey unfit because the Due Process Clause of The Fourteenth Amendment of the United States Constitution required a more stringent standard of proof. Appellant petitioned for review in timely fashion, again asserting termination of her parental rights by a preponderance of evidence standard violated her right to due process under the Fourteenth Amend-

---

*/ Tr. 1154-1155, 1168.

ment to the United States Constitution. The Oregon Court of Appeals declined reconsideration and thereafter the Oregon Supreme Court denied review, both without opinion. (See Appendices C and D)

THE QUESTION IS SUBSTANTIAL

I. THE OREGON STATUTE PERMITTING TERMINATION OF THE PARENT CHILD RELATIONSHIP BY A PREPONDERANCE OF THE EVIDENCE STANDARD IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A.

The right of a parent to the companionship and management of his or her children is a liberty, based in intrinsic human rights and natural law, around which strict constitutional protections have evolved. This Court has afforded family life both substantive and procedural protection.*/ Few human rights are, in our society, considered to be more fundamental and dear than the right to family integrity. When the State seeks to infringe upon a fundamental right it must have a compelling interest in doing so and the manner in which it does so must be rationally and necessarily related to the interest it assertedly promotes.**/ The State interest is the protection of the best interest of the children. Appellant would not dispute this interest is a legitimate State interest. (See Stanley v. Illinois, 405 U.S. 645, 652 (1972) Upon 'critical examination', however, it can be seen the interest does not become compelling, if it ever does, until all evidence has been heard and the standard of proof applied. (See Zablocki v. Redhail, 434 U.S. 374, 383 (1978) Only then does the State

---

*/ Smith v. Organization of Foster Families, 431 U.S. 816, 842, 843, 845, 53 L.Ed. 14, 97 S. Ct. 2094 (1977) and cases cited therein at n. 46 and n. 47.

**/ Roe v. Wade, 410 U.S. 113, 152, 155-56 (1973); Dunn v. Blumstein, 405 U.S. 330, 335, 342; Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Bates v. Little Rock, 361 U.S. 516, 525 (1960)

have a determination respective to the fitness of the parent and the harm to the child. Furthermore, the application of the standard of a preponderance of evidence is not rationally and necessarily related to the interest of the State since it clearly increases the risk that the parent-child relationship will be terminated in cases in which the best interest of the children coincides with the interest of the parent in maintaining family integrity. Obviously the State registers no gain toward its goal when it separates children from the custody of fit parents. (See Stanley v. Illinois, supra, 405 U.S. at 652)

B.

Apart from the requirement that the State's interest be compelling, it would appear the decision of this Court in Addington v. Texas, 441 U.S. 418 (1979) may be dispositive of the question here presented. A parent whose rights to his or her children is terminated is as surely stigmatized as an individual convicted of committing a crime. Parents who are found to have fallen below society's standards in the care of their children, whether because of neglect or incapacity, are viewed with disdain by their peers. That a termination of parental rights is a sanction, punitive in nature and as severe as the loss of one's freedom, has been recognized by Oregon's highest court.*/ This intrusion into the family unmistakably constitutes a deprivation of a liberty interest which is, at the very least, equivalent to that involved in a civil commitment proceeding, a denaturalization, expatriation or deportation hearing.**/ Arguably the interest is as great as

---

*/ State v. Jamison, 251 Or. 114, 118, 444 P2d 15, 444 P2d 1005 (1968); State v. McMaster, 259 Or. 291, 486 P2d 567 (1971).

**/ Addington v. Texas, supra; Woodby v. INS, 385 U.S. 276 (1966); Chaunt v. United States, 364 U.S. 350 (1960); Nishikawa v. Dulles, 356 U.S. 129 (1958); Gonzales v. Landon, 350 U.S. 920 (1955); Schneiderman v. United States, 320 U.S. 118 (1943).

that involved in In re Winship, 397 U.S. 358.

Ideally the State does not deprive parents of this liberty interest unless they are shown to be unfit and the children suffer serious detriment due to the parent's unfit conduct or condition. The State has no interest in terminating parents if they are fit parents or if the children do not suffer harm by reason of that unfitness. Nevertheless, the preponderance of evidence standard increases the risk that fit parents will be terminated and that termination will occur in cases where the best interest of the children is in maintenance of family integrity.

The relative interests of the State and the parent and the attendant risks must be viewed in light of the function of a standard of proof. That is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."*/ In that light it must be seen that a proceeding brought to terminate permanently the parent-child relationship is not a proceeding in which the individual should be asked to 'share equally' the 'risk of error'. (See Addington v. Texas, supra, 441 U.S. at 427)

In the instant case the Department's witnesses sought to establish that Cheryl Maffey could not and would never be able to provide adequate physical and emotional support for her son. An extensive review of her previous life was presented revealing frequent moves, numerous hospitalizations, many pleas for aid and support and requests for foster care.

The appellant, on the other hand, sought to show she had never previously had stable permanent supportive services, but

---

*/ Addington v. Texas, supra, 441 U.S. at 423, citing Justice Harlan's concurring opinion in In re Winship, 397 U.S. 358, 370 (1970).

at the time of trial did have such services and was ready and able to assume responsibility for the physical and emotional support of her son on a full time basis at that time and in the foreseeable future. She presented medical and lay testimony concerning her condition, her living circumstances, social life, and the surrounding community in which she lived.

Oregon law requires that termination of a parent's right on the basis of his or her condition be supported by evidence that 1) the parent could not at the time of trial provide the child with adequate physical and emotional care (with the aid of social agencies, if necessary); and 2) the child could not be successfuily integrated into the home in the foreseeable future due to the condition.*/ Taken in that context the burden of proof becomes very important.

Several other Courts have dealt with the question presented here. At least three State Courts have held due process does not require a more stringent standard of proof than a preponderance.**/ At least four State Courts have held due process does require a more stringent standard.***/ Additionally, several Courts have decided the issue of the standard of proof on other than due process grounds. One Court has concluded the burden of proof was required to be 'beyond a reasonable doubt' by the constitution of its own State. (See State v. Robert H., 393 A.2d 1387 (N.H. 1978) Several states have required the

---

*/ State v. Blum, 1 Or. App. 409, 417, 463 P.2d 367 (1970).

**/ In the Matter of K.M.S., 26 Or. App. 219, 552 P.2d 578 (1976); In the Matter of N.J.W., 273 N.W.2d 134 (S.D. 1978); Hernandez v. State ex rel Arizona Dept., 23 Ariz. App. 32, 530 P.2d 389 (1975).

***/ Matter of C.L.T., 597 P.2d 518 (Alaska, 1979); Matter of Welfare of Rosenbloom, 266 N.W.2d 888 (Minn. 1978); In re Heidi T., 151 Cal. Rptr. 263 (1978); In re C.H., -S.W.2d-, 48 U.S.L.W. 2669 (Tex. 1980).

standard to be 'clear and convincing'.*/ At least two other States allow the preponderance of evidence standard.**/ At least two Federal District Courts have held due process requires a more stringent standard.***/

CONCLUSION

This Court has noted probable jurisdiction in John Doe and Jane Roe v. State of Delaware, No. 79-5932, and has set the case for plenary briefing and argument. The Appellants therein raise three questions, the second of which is whether the parent-child relationship may be terminated upon the evidentiary standard of a mere preponderance of evidence without violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Appellant herein requests this Court, for the reasons set out in this Jurisdictional Statement, to note probable jurisdiction in this case and to set it for plenary briefing and argument also.

Respectfully submitted,

JAN L. PERKINS
Oregon Legal Services Corporation
Klamath Falls Regional Office
432 Main Street, Suite 205
Klamath Falls, OR 97601

---

*/ In re Sego, 513 P.2d 831 (Wash. 1973); In the Matter of Inquiry into J.L.B., 594 P.2d 1127 (Mont. 1979); In re Terry D., 148 Cal. Reptr. 221 (1978); Adoption of J.S.R., 374 A.2d 860 (D.C. 1977).

**/ People in the Interest of M.B. and M.B., 535 P.2d 192 (Colo. 1975); State in INterest of Pitts, 535 P.2d 1244 (Utah 1975).

***/ Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975) affirmed on other grounds 545 F.2d 1137 (8th Cir. 1976); Sims v. State Dept. of Welfare, 438 F.Supp. 1179 (S.D. Tex. 1972) reversed on procedural grounds, 99 S. Ct. 2371 (1979).

HEARING HELD APRIL 4, 1979

COURT'S FINDINGS AND RULING

THE COURT: Let me say this before I begin that I really appreciate the work that everybody has done in this case. I think I read every case that was presented before me in the memorandums. I certainly read at least 95 percent of them - I'm almost positive I read every case in the memorandums. The work in this case was excellent and the presentation of evidence was excellent on all parties. In no way does anybody--one side will lose and one side will win. It is not the attorneys' fault; it is the way that I see the facts of this case to fall but I am very much impressed with what both sides did and am very thankful for the aid that they gave me because it was very helpful. It did take me a couple of days to read through all these.

I'm going to terminate the child, Noel Barefoot, the mother's rights, Cheryl Maffey's rights basically under two theories: Obviously under 419.523. Subsection 2 was the issue. I am finding that the parent or parents are unfit by reason of conduct or conditions - in this case it is just the parent - the condition is seriously detrimental to the child and integration of the child into the home of the parent is improbable in the foreseeable future due to conduct or conditions not

likely to change. Basically it comes under (A) the emotional illness and (E) lack of effort on the parent to adjust to the circumstances.

I have prepared some findings here that I want to put on the record because I recognize this is probably not the court of last resort in this case and so everybody knows exactly where I stand and I will entertain any - not argument - but anything that either Counsel at the end or if they want to come back in a day or two and clarify in further detail - if they want me to make further findings on either point, I will entertain it from either side.

The child, Noel Barefoot Wright, has no early bonding nor has he any emotional or psychological attachment with his biological mother, Cheryl Maffey. He believes that his mother is Chris Taylor, a former foster mother. During this first five years of life he spent only 16 months with Cheryl Maffey. At the time of this decision, he has not seen his biological mother for one year. This is not the fault of the biological mother, because CSD refused visitation after she told the child in March of 1978 that she was finding a permanent parent for him. Most of Mrs. Maffey's contact with the child was prior to his being two years of age. From November 10, 1975, just prior to his being two years

of age until March 6, 1978, when the child was nearly four years and three months old, Mrs. Maffey only had custody of him for approximately seven months. He has been shifted from positions between foster homes, relatives, and his parents. Because of the instability in his first five years, he is aggressive, destructive, and unable to handle emotional stress. He represses his emotions, for instance. He lacks an inter-emotional life and he has no fantasies and has an extremely high anxiety level. He is a child with a high IQ who was inhibited because of his predominant fear and the threat to his security caused by the instability and lack of attachment with either biological or psychological parents.

This child is in desperate need of real, actual family stability. It must be immediate and it must be forever. The only stability that the child has at this time is his older sister, Tonya, who has been voluntarily terminated and lives with Mr. LaMarche - Mr. and Mrs. LaMarche, with whom Noel Barefoot Wright also lives. Noel Barefoot looks to his older sister as a parent. It is, without a doubt, to the best interest of the child, Noel Barefoot Wright, that the parental rights of Cheryl Maffey be terminated.

Cheryl Maffey is a 30-year-old lady who, from the

age of approximately 15, until March of 1978, has had a series of mental commitments. She has an alcoholic problem, has a history of attempted suicide, and has been assaultive. She has lived in many communities, in many homes, with many persons. Mrs. Maffey has attempted, and desires to be a loving mother, and has had good and extensive assistance from CSD and similar organizations. But with the most extensive assistance from CSD, she has been unable to conform her conduct to have a viable relationship with her son, Noel Barefoot Wright.

Since March, 1978, Mrs. Maffey has been totally involved with Portland's Urban Indian program, where she is both employed and a patient. Dr. Ball, a psychiatrist, has placed her on medication which has helped her. She is presently caring for her younger son, Sunny, and is employed teaching crafts at the program. However, during this time she has been unable to hold a maid's job at the Benson Hotel, and drapery factory. She has had three roommates, one was a male with an apparent alcoholic problem. She is totally dependent upon the Urban Indian program to take care of her financial and emotional needs. Cheryl Maffey, from the testimony of her adoptive mother, Mrs. Chiloquin, and from Mr. Larry Lawson, has been unable to give the same love and affection to Noel Barefoot Wright that she has given to her younger son,

Sunny. She herself has admitted she had much more difficulty disciplining and parenting Noel Barefoot Wright than she did with Sunny.

Dr. Ball, the treating physician, who is with the Indian Urban program and who is also from the Klamath Indian Tribe, testified that Cheryl Maffey was not schizophrenic but had a borderline personality. Dr. Ball described a person with a borderline personality as being childlike, lacks a sense of individuality, lacks the ability to relate to people, and lacks self-confidence. It is Dr. Ball's opinion that she could take care of the child, Noel Barefoot Wright. I'm in agreement that she could physically care for the child, but in disagreement that she could give the child the emotional and intellectual care that he absolutely needs at this point in his life. I have given Dr. Ball's testimony greater weight because he is the treating physician, but this is tempered by the fact that I have never seen a treating psychiatrist testify adversely to his client's interest. It would obviously destroy the doctor-patient relationship. Secondly, I found Dr. Ball to be an advocate for Cheryl and not totally objective and finally, Dr. Ball did not see the child, Noel Barefoot Wright. Dr. McCook was of the opinion that she is schizophrenic and Dr. Scheen, a psychologist, was unable to say if she

is schizophrenic or borderline.

In my opinion, there is a continuum from neurotic to psychotic with borderline personality in the middle, and Mrs. Maffey falls into the borderline to psychotic classification. I find the distinction between borderline and schizophrenic makes no difference in the outcome of the case. What is important is that she has a condition that prevents her from being capable of giving the minimum emotional and intellectual support that the child, Noel Barefoot Wright, must have to develop into a secure, normal human being.

Even under the close supervision of Dr. Ball and the Portland Urban Indian program, she is at best just maintaining herself and one child with whom she has a totally different relationship. It takes all her intellect, constant medication, and total support to maintain herself and her son. The greater weight of evidence is that she will leave the support group in Portland as she has in the past for another home in another town.

This is not the deciding issue in this case, but the deciding issue is that she will be unable, because of her mental condition, to give Noel Barefoot Wright the emotional and intellectual help he needs, and unfortunately for Mrs. Maffey she will never have the

ability to give this support.

Now, I am going to talk about the various persons that have testified and how I weighed their testimony, and as I say, if anybody wishes me to make any further comments as to any other testimony I will be very happy to do so. One thing I have to say before I begin, I'm not going to talk too much about many of the persons from CSD. I will only be talking about Larry Lawson and Prommeyer but I have never seen more extensive help given to an individual than I did in this particular case. Mrs. Maffey had extensive help from CSD and other agencies but most extensively from CSD. The persons that testified from CSD, I thought, were quite competent, and quite good, and I really can't see what CSD could have done anymore than they did in this particular case in trying to work with Mrs. Maffey to reintegrate Mrs. Maffey with her children. Granted, there was often conflict that will arise between persons in the situations of Mrs. Maffey and CSD which could only be expected, but in no way can I find any fault on the part of the Children's Services Division and their particular handling of this particular case in trying to integrate the children back into the home over this four or five-year period. I can go on record and say I'm not always that kind to CSD.

Let me talk about some of the important persons that I think testified: One was Mrs. Leatha Chiloquin who adopted Cheryl Maffey shortly after her birth in September of 1948. Mrs. Chiloquin testified in favor of termination, and it is frankly, apparent that there is a great conflict between Cheryl and her adopted mother, but it must be remembered that Mrs. Chiloquin was the person most familiar with Cheryl's childhood, and with Cheryl's life. Mrs. Chiloquin is an intelligent lady and an ardent supporter of Indian rights. Cheryl had the benefit of not only her mother but of other members of the Klamath Tribe in August and September of 1977.

Mrs. Chiloquin described a different reaction between Cheryl and Bare, and Cheryl and Sunny, stating that Cheryl had much stronger feelings towards Sunny's father and that she had extreme affection for Sunny. Mrs. Chiloquin also described that Bare looked towards Tonya, his older sister, like a mother. In Mrs. Chiloquin's opinion, Bare needed more love and affection than Cheryl could offer him. She also described the spending of the money, being the allotment of about $7,500 that Cheryl was unable to manage.

Mrs. LaMarche is an important figure in this case. Mrs. LaMarche's husband is an Iriquois Indian and

together they have been foster parents to numerous Indian children in Klamath County. She appears to be an able person and very concerned about the children in her care. She has known Cheryl for many years and has been involved with Cheryl and her children for nearly eight years. I find her testimony totally credible, and she's the one that testified that Noel Barefoot Wright was very destructive, wetted his bed, had nightmares when she began caring for him. She's also the one that says that Noel Barefoot Wright does not know that Cheryl is his real mother and believes his real mother is Chris Taylor, a foster parent in Eugene. She is also the one that testified that Bare is dependent on Tonya and the one who said that when Bare and Cheryl parted ways in March of 1978 that there was no reaction by Bare. He did not realize that Cheryl Maffey had any real connection with him. In making this decision I have taken into account that in her testimony she did not - she stated that she didn't think that her family could take Bare in as a permanent child. Obviously, for Bare's interest being of his close attachment to his sister, that would be the best place to place him, but I--we didn't go into that testimony and I accept the fact that she and her husband have given so much that she can just not take that next child down the line and I'm not anticipating

that Bare would be adopted into that home.

Lynn Fronmeyer - I was extremely impressed with her. She is an extremely competent individual, involved with permanent planning with Cheryl. She worked extensively with her in July of 1976, at which time Cheryl immediately left Eugene after the initial contact. Mrs. Fronmeyer finds that Bare, who was with the Taylor family in November, 1975, to June, 1977, was a psychological family, and at that time, in June, 1977, he had a positive reaction to Cheryl but Mrs. Taylor was the psychological mother. She also described Cheryl in the June 4th meeting, 1977, as projecting her problems on others. And I frankly have a lot of respect for Mrs. Fronmeyer in that she thinks the best interest of the child would be for termination to take place.

Larry Lawson is a caseworker who has been before the Court many many times and I have great respect for Mr. Lawson. I find him very competent, very honest in his relationship between the client and what he reports to the Court. I find that his testimony is important in about four or five areas in this case: One, being the role reversal between parent and child where Cheryl is often childlike and both Noel and Tonya would often be in the role of parent with Cheryl, and that Cheryl needed the children for her emotional security and was unable to

nurture the children. Mr. Lawson, secondly, saw rejection of the child, Noel Barefoot Wright, by Cheryl and how she was unable to give - how she was able to give love and affection to Sunny, but not to Noel Barefoot Wright, and that she could discipline Sunny but was unable to effectively discipline Noel Barefoot Wright. He also described in 1978 how Tonya was the mother figure to Bare. Mr. Lawson was also able to describe the support that Cheryl received in August, 1977, in what was referred to as the Village in Chiloquin, Oregon. The Village is run by her adoptive mother's present husband. It is a meeting place of Cheryl's family and other members of the Klamath Indian community, giving Cheryl support. He also described how after she was no longer the center of attention she no longer remained with the group. Mr. Lawson has also been able to describe that Bare had made significant progress since he's been with the LaMarches; that he's not wetting his bed, not having the nightmares, not having the problems that he had previous to that. He also gave his opinion - I accepted - that Cheryl cannot stand the pressure of raising Bare. Laura Brant is not so important as she is interesting from the facts that she worked with Cheryl in 1969. She provided her with housekeeping and mothering duties. She described Cheryl at that time as having wide swings of personality. She

happened to see her again in 1978 when she was hospitalized in PIH and found her to be substantially the same person she had seen in 1969.

Mrs. Clark, who testified in favor of Cheryl, I found her to be an impressive witness. She described Cheryl's house as being a clean house. She described Sunny as being a very warm and loving little boy.

Miss Peterson is a social worker with the Indian group in Portland. Cheryl - and I found her to be very impressive - Cheryl - she described Cheryl's roommate problems. She stated that she believes Cheryl suffered from delayed adolescence, a problem of identity with minority people. I find that the theory - I don't have any problems accepting the theory that takes place, I just do not believe that that is Cheryl's particular problem. She also learned about the problem that Cheryl had at the drapery factory in April, she also learned about Cheryl hearing voices in May of '78, how she became depressed in June of 1978 by not taking medication, how in July of 1978 she could not cope with Leonard and his drinking problem, and she continued to have problems with Leonard in August of 1978; and up until the time of the hearing she was worried about how to manage her own affairs.

Cecilia Fisher, who was with Cheryl throughout the

entire case hearing of this particular case, I frankly was not impressed with her and really did not take into account any of her testimony.

Dr. McCook who is a psychiatrist, who is first, not Board certified, but I was frankly impressed with his abilities. He found her to be schizophrenic and found her predominately deficient in her social relations so that she had no emotionality; had a flattened affect. As I say, I don't believe that she's really a chronic schizophrenic as he testified, but I did find him impressive in his testimony. He found that Noel Barefoot Wright was healthy, no evidence of thought disorder or mental illness. He did say that because of the many placements through foster homes, he had mild to moderate phobias and less capacity to rechannel stress than other children. Predominant in his personality was fear and threat to his security. I find this concrete from the testimony of Dr. McCook and Dr. Scheen. He stated that Noel Barefoot Wright had a high IQ which was not being exercised because of the instability. He stated that if the pattern continues it will have a detrimental effect on the child. He also was the one that found that Noel Barefoot Wright had much greater psychological attachment to his sister, Tonya, than to Cheryl and in effect had no showing of any natural affection or bonding attachment to

Cheryl. He stated that the child needed stability and consistency.

I think I have discussed Dr. Ball, he is Board certified which should be noted and I gave him greater weight because of the fact that he's the treating physician. He found that she was motivated and has the intent to change and feels that she could be an adequate parent. I don't disagree that she could possibly be an adequate parent to Sunny, but I do not agree that she could be an adequate parent to Noel Barefoot.

Dr. Scheen, from the Minnesota test and the Rorschack test, finds the child, excuse me, from the Rorschack test, finds that the child had emotional pressure and should not have additional pressures, and I agree with that entirely. He found that the child was intellectually high but tests low. Also he found that the child had not emotional life which prevents him from acting out. He had a high anxiety level. He definitely believed the child's best interest would be served with a secure home setting. He needs the same home, same bed, same friends, strong parental guidance which I just don't believe that Cheryl can give to this child.

Anything else at this particular time?

I will be very happy to address any further

questions that anybody has to the way I weighed evidence or anything like that; obviously with everybody present and on the record.

MR. PERKINS: Your Honor, we did raise the issue of the standard which should be used in making the decision, the preponderance of the evidence versus the beyond a reasonable doubt. I would appreciate if the Could would state which standard he used and whether he would find this to be the same rule under the more stringent standard.

THE COURT: I find beyond a reasonable doubt that the child's best interests are for termination. I could not find - I find by a preponderance of the evidence that Cheryl will be unable to change or adjust her home life, but I can't say beyond a reasonable doubt to that aspect in the future, but without a doubt, in my mind, the child's best interest is termination; that he has no bonding, no psychological ties; he's in desperate need of security - that is beyond a reasonable doubt. But, the aspect as to Cheryl is by a preponderance of the evidence. It is not beyond a reasonable doubt that she, but by a preponderance of the evidence, I believe that she will not be able to adjust her life or change, but I cannot say that beyond a reasonable doubt.

I do believe I can state by clear and convincing,

but not beyond a reasonable doubt.

I'm sorry, I didn't bring that up because I frankly worked with that very hard.

I do not think that the Indian Statute applies at this time. I put that on the record and the one that you raised which is theoretically goes into effect in May of this year.

Anything else at this time? I will be very happy to discuss any of it because I have gone through it all and there is a high probability - we all know there is a very high probability this will go on appeal and what they need is a record, so I will be very happy.

MR. MOLATORE: We have nothing further.

MR. UERLINGS: Nothing.

THE COURT: Between the two of you, figure out who's going to draw the order.

Gentlemen, this is an interesting case, I enjoyed working with you very sincerely and you all did a great job, both sides.

Thank you very much.

CONCLUSION OF CASE.

/ / /

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Case Name:

In the Matter of Noel Barefoot Wright, a child.

State of Oregon ex rel Juvenile Department of Klamath County (Respondent)

v.

Cheryl Maffey (Appellant)

14550 (CA No.) 102-78 (Circuit Court No.) (District Court No.)

County Klamath Judge Ted Abram

(Agency No.) Judicial Review from

Date argued 2/20/80 Date submitted on briefs

Before Buttler, Presiding Judge, and Gillette and Roberts, Judges

Jan L. Perkins (Name) Appellant (Attorney for)

Walter L. Barrie/Al J. Laue (Name) Respondent (Attorney for)

Date affirmed from the bench and date filed

Date affirmed without opinion (ORS 19.180) and date filed March 3, 1980

RECEIVED APR 1 3 1980

SUPREME COURT COURT of APPEALS

LOREN D. HICKS
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503

Re Cases on Appeal 378-6025
Legal Counsel 378-6022
Oreg. Reports Editor 378-2802

APPENDIX C
April 11, 1980

Jan L. Perkins
Oregon Legal Services
432 Main Street Suite 205
Klamath Falls, OR 97601

Re: State ex rel Juvenile Dept vs. Maffey
CA 14550 SC 26932

Dear Mr. Perkins:

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has on April 9, 1980, decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. No mandate can issue until the Supreme Court has completed its review of the petition.

Yours very truly,

Carol Justis/vr

Carol Justis
Records Administrator

CJ/vr
cc: Walter L. Barrie

SUPREME COURT COURT of APPEALS

LOREN D. HICKS
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503
Re Cases on Appeal 378-6033
Legal Counsel 378-6022
Oreg. Reports Editor 378-2802

APPENDIX D

May 14, 1980

RECEIVED MAY 16 1980

Jan L. Perkins
Oregon Legal Services Corp.
432 Main Street Suite 205
Klamath Falls, OR 97601

Re: State ex rel Juvenile Dept v. Maffey
CA 14550 SC 26932

Dear Mr. Perkins:

The Supreme Court on May 13, 1980, denied Appellant's Petition for Review in the above-entitled matter.

Very truly yours,

Marilyn Hartley
Supreme Court Calendar Clerk

MH/vr
cc: Walter L. Barrie

FILED
Aug. 8, 1980

APPENDIX E

STATE OF OREGON

COURT OF APPEALS

CHERYL MAFFEY,

Appellant,

v.

STATE OF OREGON ex rel JUVENILE DEPARTMENT OF KLAMATH COUNTY,

Appellee.

CA 14550

SC 26932

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cheryl Maffey, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of Oregon, affirming the trial court order terminating Appellant's parental rights to her son, Noel Barefoot Wright. The Court of Appeals affirmed on March 3, 1980 and declined reconsideration on April 9, 1980. The Supreme Court of Oregon denied Appellant's Petition for Review on May 13, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel for Appellant

638 MAIN STREET, ROOM 208
KLAMATH FALLS, OREGON 97601
PHONE: (503) 882-9986

(f) To make such reports and to supply such information to the court as the court may from time to time require.

(2) A person appointed guardian of the child by the court is guardian only and not a conservator of his estate, unless that person is appointed conservator of the child's estate in a protective proceeding as provided in ORS 126.003 to 126.413. [1959 c.432 §§24, 25; 1961 c.344 §105; 1973 c.823 §136]

419.522 [Repealed by 1959 c.432 §59]

419.523 Termination of parental rights; grounds. (1) The parental rights of the parents of a child within the jurisdiction of the juvenile court as provided in subsection (1) of ORS 419.476 may be terminated as provided in this section and ORS 419.525. The rights of one parent may be terminated without affecting the rights of the other parent.

(2) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home of the parent or parents is improbable in the foreseeable future due to conduct or conditions not likely to change. In determining such conduct and conditions, the court shall consider but is not limited to the following:

(a) Emotional illness, mental illness or mental deficiency of the parent of such duration as to render it impossible to care for the child for extended periods of time.

(b) Conduct toward any child of an abusive, cruel or sexual nature.

(c) Addictive use of intoxicating liquors or controlled substances.

(d) Physical neglect of the child.

(e) Lack of effort of the parent to adjust the circumstances of the parent, conduct, or conditions to make the return of the child possible or failure of the parent to effect a lasting adjustment after reasonable efforts by available social agencies for such extended duration of time that it appears reasonable that no lasting adjustment can be effected.

(3) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents have failed or neglected without reasonable and lawful cause to provide for the basic physical and psychological needs of the child for one year prior to the filing of a petition. In determining such failure or neglect, the court shall consider but is not limited to one or more of the following:

(a) Failure to provide care or pay a reasonable portion of substitute physical care and maintenance if custody is lodged with others.

(b) Failure to maintain regular visitation or other contact with the child which was designed and implemented in a plan to reunite the child with the parent.

(c) Failure to contact or communicate with the child or with the custodian of the child. In making this determination, the court may disregard incidental visitations, communications or contributions.

(4) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents have abandoned the child or the child was left under circumstances such that the identity of the parent or parents of the child was unknown and could not be ascertained, despite diligent searching, and the parent or parents have not come forward to claim the child within six months following the finding of the child. [1959 c.432 §26; 1963 c.152 §1; 1973 c.804 §1; 1979 c.744 §21]

419.524 [Repealed by 1959 c.432 §59]

419.525 Termination of parental rights; procedure. (1) An order pursuant to ORS 419.523 may be made only after service of summons, as provided in ORS 419.488 on the parent or parents. The summons shall contain a statement to the effect that the rights of the parent or parents are proposed to be terminated in the proceeding. The statement may be made in the summons originally issued in the proceeding or in separate summons issued at any subsequent stage of the proceeding.

(2) A hearing shall be held by the court on the question of terminating the rights of the parent or parents. No such hearing shall be held any earlier than 10 days after service or final publication of the summons. The facts on the basis of which the rights of the parents are terminated, unless admitted, must be established by a preponderance of competent evidence and a stenographic or other report authorized by ORS 8.340 shall be taken of the hearing.

(3) Unless there is an appeal from the order terminating the rights of the parent or parents, the order permanently terminates all rights of the parent or parents whose rights

are terminated and the parent or parents have no standing to appear as such in any legal proceeding concerning the child. [1959 c.432 §27]

419.526 [Repealed by 1959 c.432 §59]

419.527 Court's powers after termination of parental rights; consent to child's adoption. (1) After the entry of an order terminating the rights of the parent or parents of the child, the court may:

(a) Place the child in the legal custody and guardianship of a public or private institution or agency authorized to consent in loco parentis to the adoption of children. An order pursuant to this paragraph is a "permanent commitment" for the purposes of ORS 109.305, 109.310 to 109.330 and 109.345 to 109.390; or

(b) Make any order directing disposition of the child which it is empowered to make under ORS 419.472 to 419.597, 419.800 to 419.840 and subsection (2) of 419.990.

(2) If the rights of only one parent have been terminated, the authority to consent to the adoption of the child as provided in paragraph (a) of subsection (1) of this section is effective only with respect to the parent whose rights have been terminated. [1959 c.432 §28]

419.528 [Repealed by 1959 c.432 §59]

419.529 Court's power to modify or set aside its orders; hearing. (1) Except as provided in this section, the court may modify or set aside any order made by it upon such notice and with such hearing as the court may direct.

(2) Except as provided in subsection (3) of this section, notice and a hearing as provided in ORS 419.486 to 419.505 shall be granted in any case where the effect of modifying or setting aside the order will or may be to deprive a parent of the legal custody of the child, to place the child in an institution or agency or to transfer the child from one institution or agency to another. However, the provisions of this subsection shall not apply to a parent whose rights have been terminated under ORS 419.523 and 419.525 or whose child has been permanently committed by order of the court unless an appeal from such order is pending.

(3) Notice and a hearing as provided in subsection (2) of this section are not required where the effect of modifying or setting aside the order will be to transfer the child from one foster home to another.

(4) No order pursuant to paragraph (a) of subsection (1) of ORS 419.527 may be set aside or modified during the pendency of a proceeding for the adoption of the child, nor after a petition for adoption has been granted. [1959 c.432 §29; 1963 c.496 §2]

419.530 [Renumbered 419.308 and then 418.570]

419.531 Termination of court's wardship over child. The court's wardship over a child brought before it continues until whichever of the following occurs first:

(1) The court dismisses the petition concerning the child or remands the case to the appropriate court handling criminal actions, or to municipal court. If the court has wardship of a child based upon a prior petition, remanding the child to the court handling criminal actions, or to municipal court in connection with a subsequent violation of a law or ordinance relating to the use or operation of a motor vehicle does not terminate the wardship, unless the court so orders.

(2) The court transfers jurisdiction over the child as provided in ORS 419.479, 419.547 or 419.549.

(3) The court by order terminates its wardship.

(4) A decree of adoption of the child is entered by a court of competent jurisdiction.

(5) The child becomes 21 years of age. [1959 c.432 §30; 1979 c.275 §3]

419.532 [Repealed by 1959 c.432 §59]

419.533 Remanding of child to another court. (1) A child may be remanded to a circuit, district, justice or municipal court of competent jurisdiction for disposition as an adult if:

(a) The child is at the time of the remand 16 years of age or older;

(b) The child committed or is alleged to have committed a criminal offense or a violation of a municipal ordinance; and

(c) The juvenile court determines that retaining jurisdiction will not serve the best interests of the child because the child is not amenable to rehabilitation in facilities or programs available to the court.

(2) The juvenile court shall make a specific, detailed, written finding of fact to support any determination under paragraph (c) of subsection (1) of this section.

(3) The juvenile court may enter an order directing that all cases involving violation of

RECEIVED
AUG 12 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5227
No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHERYL MAFFEY

v.

STATE OF OREGON ex rel JUVENILE
DEPARTMENT OF KLAMATH COUNTY

On Appeal From the Court of Appeals of Oregon

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

JAN PERKINS
Oregon Legal Services Corporation
Regional Office
432 Main , Suite 205
Klamath Falls, Oregon 97601
503-884-7709

Counsel for Appellant

The Appellant, Cheryl Maffey, asks leave to file the attached Jurisdictional Statement without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Leave to proceed in forma pauperis was not sought in any of the lower courts.

The appellant's affidavit in support of this motion is attached hereto.

by Jan Perkins
Counsel for Appellant

RECEIVED
AUG 12 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5227

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, ;980

CHERYL MAFFEY

v.

STATE OF OREGON ex rel JUVENILE
DEPARTMENT OF KLAMATH COUNTY

On Appeal From the Court of Appeals of Oregon

AFFIDAVIT

I, Cheryl Maffey, being first duly sworn, depose and say I am the appellant, in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I futher swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Ans. No. I was last employed April, 1979, and I received $600.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Ans. No.

3. Do you own any cash or checking or savings account?

Ans. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Ans. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Ans. Sonn Maffey, son; Michelle Danya Kennedy, daughter.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Subscribed and sworn to before me this day of August, 1980.

Cheryl Maffey
Cheryl Maffey

Commission expires: February 23, 1983

Crystal L. Saunders
Notary Public for Oregon

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS
CLERK

No. 80-5227

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHERYL MAFFEY,

Appellant,

v.

STATE OF OREGON ex rel JUVENILE DEPARTMENT OF KLAMATH COUNTY,

Appellee.

On Appeal From the Court of Appeals of Oregon

MOTION TO DISMISS OR AFFIRM

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
Counsel of Record
RICHARD DAVID WASSERMAN
Assistant Attorney General
FRANK MUSSELL
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Attorneys for Appellee
State of Oregon

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

TABLE OF CONTENTS

Motion	Page
Question Presented	i
Motion to Dismiss or Affirm	1
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes	1
Statement of the Case	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases Cited

Addington v. Texas, 441 U.S. 418, 431 (1979)	7
Durley v. Mayo, 351 U.S. 277, 281 (1956)	4
Ex parte Burrus, 136 U.S. 586, 593, 594 (1890)	7
Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1953)	5
Grayson v. Harris, 267 U.S. 352, 358 (1925)	6
Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934)	4
Mathews v. Eldridge, 424 U.S. 319 (1976)	7
Popovici v. Agler, 280 U.S. 379, 383 (1930)	7
Portland R. L. & P. Co. v. Railroad Commission, 229 U.S. 397, 411-12 (1913)	5
Santosky v. Kramer, 49 U.S.L.W. 3710	6
State ex rel Juv. Dept. v. Jones, 290 Or. 799, 810, 626 P.2d 882 (1981)	5
State ex rel Juv. Dept. v. Thomas T., 30 Or. App. 385, 390, 567 P.2d 135 (1977)	5

Constitutional and Statutory Provisions

28 U.S.C. § 1257(2)	1
28 U.S.C. § 2103	1
28 U.S.C. § 1257(3)	1
Or. Rev. Stat. § 419.523	7
U.S. Const. Amend. XIV	1, 7

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

Other Authorities

N.Y. Family Court Act § 622 6

N.Y. Family Court Act §§ 611, 614 7

N.Y. Social Services Law § 384-b 7

Wald, State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 633-36 (1976). . 7

Maluccio, Fein, Hamilton, Klier, & Ward, Beyond Permanency Planning, Child Welfare (November 1980). . . 8

Foster Care Reform in the 70's (Final Report, Permanency Planning Dissemination Project) 8

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

QUESTION PRESENTED

Appellee State of Oregon disagrees with appellant's statement of the question presented, and submits instead the following as the question presented on appeal:

Was appellant denied due process when her parental rights to her child Noel Barefoot Wright were permanently terminated upon the trial court's finding that the state proved the substantive statutory requirements for termination by clear and convincing evidence?

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

MOTION TO DISMISS OR AFFIRM

Appellee, State of Oregon, moves, pursuant to Rule 16, for an order dismissing the appeal in this case, on the ground that the judgment rests on an adequate state ground. In the alternative, appellee moves for an order affirming the judgment, on the ground that appellant has not shown that the Oregon Court of Appeals incorrectly decided a federal question. If this Court notes probable jurisdiction in this case, appellee moves for an order consolidating it with Santosky v. Kramer, No. 80-5889, for purposes of oral argument.

OPINIONS BELOW

Appellant's statement is accepted.

JURISDICTION

Appellant asserts that the issue in this case is whether the Oregon statute which permits the permanent termination of the parent-child relationship by the application of the preponderance of evidence standard is valid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Under appellant's formulation of the question presented, jurisdiction of this Court would be based upon 28 U.S.C. § 1257(2). As more fully explained below, however, the trial court found that the State of Oregon proved its case by clear and convincing evidence. Consequently, the constitutionality of the preponderance standard prescribed by the Oregon statute is not in issue. Rather, the issue is whether the termination of appellant's parental rights under proof by clear and convincing evidence denied her due process. This Court lacks jurisdiction to entertain that question on appeal. Under 28 U.S.C. § 2103, appellant's Jurisdictional Statement should be treated as a petition for writ of certiorari pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Appellant's statement is accepted.

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

STATEMENT OF THE CASE

Because appellant's statement of facts omits much of the state's evidence in favor of permanent termination of her parental rights in her child, Noelle Barfoot Wright, appellee supplements that statement of facts as follows.

Mrs. Maffey suffers from chronic schizophrenia. (Tr. 318.) The prognosis for Mrs. Maffey is that there is a substantial likelihood that she will experience the recurrence of an acute psychotic episode requiring extended hospitalization within one year to eighteen months. (Tr. 324-328.) At the time of trial Mrs. Maffey was taking prescription anti-psychotic medication, anti-depressant medication, and medication to combat the side effects of the other two drugs. (Tr. 345.) Mrs. Maffey had been continuously under the care of a psychiatrist, Dr. McCook, for the seven months prior to the trial. (Tr. 345). During the preceeding year, Mrs. Maffey was continuously under the care of another psychiatrist, Dr. Wayland. (Tr. 831-832.) Mrs. Maffey's extensive history of psychiatric hospitalizations began in 1962, when she was fourteen years old. During the next sixteen years, Mrs. Maffey was hospitalized more than nineteen times. (Tr. 51-58, 75-79, 1121-1127, Child's Exhibit 9.) Her psychiatric history also includes several suicide attempts, such as incidents of cutting her wrists, taking overdoses of drugs, and setting fire to herself. (Tr. 121-123.)

Although, at the time of trial, she was still married to her second husband, Mr. Maffey, Mrs. Maffey testified that she had been living with one Leonard Husky, the father of her fourth child, Sonny, for the preceding six months. (Tr. 47, 1102.) She acknowledged that Mr. Husky was a source of problems for her in that he had a drinking problem, he did not always come home, and he had recently assaulted her. (Tr. 1102, 1104, 1130.) Mrs.

/

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

Maffey testified that she currently drinks occasionally. (Tr. 124.) She previously acknowledged to her caseworker that she was an alcoholic and that she had spent time as an inpatient in an alcohol rehabilitation half-way house. (Tr. 462, 500.) Mrs. Maffey has a history of chronic episodic alcohol abuse. (Tr. 314.) During the seven months preceding the trial Mrs. Maffey had three different jobs. (Tr. 85-86.) She lived in nineteen different places during the preceding five years (excluding hospitalizations); and the longest period she remained in a single residence was ten months. (Tr. 88, 137). During this ten month period from August 1976 to June 1977, Noel was in foster care. (Child's Exhibit 9).

The State's involvement in Mrs. Maffey's relationship with her children predated the birth of Noel Barefoot Wright. Her older children, Tonya and Stormy, were placed in foster care from December, 1971 until October, 1973. (Tr. 231-232, 250, 252, 889.) Noel was born on December 18, 1973. (Tr. 45.) He turned five during the trial and celebrated his fifth birthday in a foster home. During his five years he had eight different foster placements. He lived continuously with Mrs. Maffey without a major disruption of his placement with her only for six and one-half months and he lived in foster homes for thirty months of his life. (Tr. 804-806, 837-838, 1120-1126, Child's Exhibit 9). Noel never bonded with or formed an attachment to Mrs. Maffey, and he viewed his former foster mother as his psychological mother. (Tr. 804-810). As a result of his frequent placements and Mrs. Maffey's incapacity, Noel, although potentially of high intellect, suffered substantial emotional stress which he repressed and internalized. An evaluating psychologist noted that Noel was highly anxious and reverted to immature behavior. (Tr. 16-18.) Noel's foster mother confirmed this evaluation in her description of his disturbed behavior in her home. (Tr.

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

663-683.) It was undisputed that Noel desperately needs the stability and continuity of a single caretaker. (Tr. 22.)

Prior to the filing of the petition seeking termination of her parental rights, Mrs. Maffey decided to place her three children, Tonya, Noel, and Sonny, for adoption. Her caseworker advised her to retain custody of Sonny and assisted her in planning for the relinquishment of Tonya and Noel. Subsequently, she changed her mind about placing Noel for adoption, although she proceeded with her plans for adoption of Tonya. (Tr. 797-800, 874-878.) These termination proceedings followed. At the trial Mrs. Maffey's adoptive mother testified in favor of termination of Mrs. Maffey's parental rights to Noel. (Tr. 723-727.)

Contrary to appellant's contention, the trial court did not terminate Cheryl Maffey's parental rights under the preponderance of the evidence standard. The Circuit Court found by clear and convincing evidence that Cheryl Maffey was unfit by reason of conduct or condition seriously detrimental to the child and that integration of the child into her home was improbable in the foreseeable future due to conduct or conditions not likely to change. (Tr. 1154-55, 1159-60, 1168-69.) The court also found beyond a reasonable doubt that termination of the mother's parental rights was in the child's best interests. (Tr. 1156, 1168.)

ARGUMENT

The judgment in this case rests on an adequate non-federal basis.

This Court will not take jurisdiction to review a judgment when the highest court of the state delivers no opinion and it appears that the judgment might have rested upon an adequate non-federal ground. E.g., Durley v. Mayo, 351 U.S. 277, 281 (1956); Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934). In Lynch, this Court stated:

/

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone: 378-4400

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." 293 U.S. at 54.

In this case it does not appear affirmatively from the record that resolution of the due process question presented here was necessary to the determination of the Oregon Court of Appeals. Appellee does not dispute that appellant challenged the constitutionality of the preponderance standard in a timely fashion in the trial court, and properly renewed that challenge in the Oregon Court of Appeals. Nonetheless, the Court of Appeals could have disposed of the case on adequate non-federal grounds: that under any standard of proof, the evidence was sufficient to satisfy Oregon's substantive statutory standard for permanent termination of appellant's parental rights. In Oregon, on appeals in cases involving petitions to terminate parental rights, the appellate court examines the evidence de novo, while giving weight to the findings by the trial judge who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony. State ex rel Juv. Dept. v. Jones, 290 Or. 799, 810, 626 P.2d 882 (1981). In at least one previous appeal in a termination case, the Oregon Court of Appeals, upon de novo review of the record, found "that the state did in fact establish, not only by a preponderance of the evidence, but beyond any reasonable doubt" that the substantive statutory standards for termination had been satisfied. State ex rel Juv. Dept. v. Thomas T., 30 Or. App. 385, 390, 567 P.2d 135 (1977). Assuming that the court so found in the case at bar, the resolution of the federal question was unnecessary to the court's disposition of the appeal. In addition, the state court's finding of fact would not be reviewable by this Court. See, e.g., Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1953); Portland R. L. & P. Co. v.

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

Railroad Commission, 229 U.S. 397, 411-12 (1913). This Court does not review state court findings that form merely the basis upon which the state court concluded that a federal issue need not be reached. See Grayson v. Harris, 267 U.S. 352, 358 (1925).

Because it does not appear affirmatively from the record that the judgment necessarily rests on the Oregon Court's resolution of the federal question, this Court should dismiss the appeal under Rule 12.1(b) of the Rules of this Court.

The judgment of the Oregon Court of Appeals should be affirmed.

As stated above, the record shows that the Oregon Court of Appeals may have decided this case on the adequate non-federal ground that the state's evidence satisfied any standard of proof, including beyond a reasonable doubt. If that premise is accepted, this Court should affirm, on the basis that the Oregon Court of Appeals, pursuant to factual findings not reviewable in this Court, properly terminated the parental rights of Cheryl Maffey under Oregon's substantive standards for termination.

If this Court accepts review, this case should be consolidated for purposes of oral argument with Santosky v. Kramer, No. 80-5889.

On March 23, 1981, this Court granted the petition for certiorari in Santosky v. Kramer, 49 U.S.L.W. 3710. That case raises the question whether Section 622 of the New York Family Court Act is unconstitutional because it permits the Family Court to terminate parental rights upon a "fair preponderance of the evidence." If this Court accepts review in the case at bar, appellee respectfully moves, pursuant to Rule 37.3 of the Rules of this Court, that the present case be consolidated with Santosky v. Kramer for purposes of oral argument.

The question of the standard of proof mandated by the Due Process Clause in cases involving termination of parental rights is of substantial importance to the states. This Court has observed

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

that the determination of the child custody is traditionally the exclusive province of state courts. See Popovici v. Agler, 280 U.S. 379, 383 (1930); Ex parte Burrus, 136 U.S. 586, 593, 594 (1890). The various state statutory schemes permitting permanent termination of parental rights vary significantly. See Wald, State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 633-36 (1976). In the context of involuntary civil commitment, this Court recently noted that the fact that some states legislatively or judicially had adopted a standard of proof greater than that required by the Due Process Clause did not assure

> * * * * that the more stringent standard of proof is needed or is even adaptable to the needs of all states. The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum." Addington v. Texas, 441 U.S. 418, 431 (1979).

Addington v. Texas, and earlier cases such as Mathews v. Eldridge, 424 U.S. 319 (1976), indicate that the determination whether a particular practice comports with due process must not be made in a vacuum. Rather, the Court must evaluate the practice in relation to the larger body of procedures of which it forms but a part, and consider whether the procedure as a whole satisfies the Due Process Clause. For instance, in deciding the requisite standard of proof for termination of parental rights, the Court must not ignore the differing substantive standards for termination enacted by the 50 states, and the equally diverse procedures by which the courts of the states adjudicate cases under those standards. Compare, e.g., N.Y. Family Court Act §§ 611, 614 and N.Y. Social Services Law § 384-b with Or. Rev. Stat. § 419.523. In addition, it is important to weigh the effect of administrative policies and procedures which lead to the decision to seek termination of parental rights.

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

In recent years Oregon has been a nationally-recognized innovator in this area, with its revolutionary Oregon Project. See Maluccio, Fein, Hamilton, Klier, & Ward, Beyond Permanency Planning, Child Welfare (November 1980); Foster Care Reform in the 70's (Final Report, Permanency Planning Dissemination Project).

Consolidation of this case with Santosky v. Kramer would serve to highlight for this Court the distinctions among various state procedures and practices in the field of termination of parental rights. It would enable the Court better to evaluate the minimum requirements of due process in this difficult and sensitive area. By expanding its review to include the statutory scheme of more than one state, the Court will facilitate the formulation of constitutional guidelines which do not unduly hamper the flexibility of the states to develop new approaches which achieve the proper balance between parental interest and the state's interest and duty to protect children and to provide those children with a nurturing environment.

CONCLUSION

For the reasons stated above, this appeal should be dismissed, or in the alternative, the judgment of the Oregon Court of Appeals should be affirmed. If this Court accepts review, this case should be consolidated, for purposes of oral argument, with Santosky v. Kramer, No. 80-5889.

Respectfully submitted,

DAVID B. FROHNMAYER
Attorney General of Oregon

WILLIAM F. GARY
Solicitor General
Counsel of Record
RICHARD DAVID WASSERMAN
Assistant Attorney General
FRANK MUSSELL
Assistant Attorney General

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5227

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHERYL MAFFEY

v

STATE OF OREGON ex rel JUVENILE
DEPARTMENT OF KLAMATH COUNTY

On Appeal From the Court of Appeals of Oregon

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

JAN L. PERKINS
Oregon Legal Services Corporation
Klamath Falls Regional Office
432 Main Street, Suite 205
Klamath Falls, OR 97601
Telephone: (503) 884-7709

Counsel for Appellant

August 1981

TABLE OF CONTENTS

	Page
Brief Opposing Motion to Dismiss or Affirm.	1
Jurisdiction.	1
A Supplemental Statement of the Case.	1
Argument.	3
Conclusion.	6

TABLE OF AUTHORITIES

Cases Cited

California v Kibuda, 409 U.S. 33, 34 L.Ed2d 45, 93 S.Ct. 32 (1972)	6
Durley v Mayo, 351 U.S. 277 (1956).	3
Dixon v Duffey, 342 U.S. 33, 96 L.Ed 46, 72 S.Ct. 10 (1951)	6
Hannan v Good Samaritan Hospital, 4 Or.App. 178, 471 P.2d 831, 476 P.2d 931 (1970), Sup. Ct. review denied (1971).	4
Herb v Pitcairn, 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459 (1945).	6
Honeyman v Hanan, 300 U.S. 14, 81 L.Ed. 476	3
In the Matter of K.M.S., 26 Or.App. 219, 552 P.2d 578 (1976).	5
Konigsberg v State Bar of California, 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 722.	3
Magwire v Tyler, 8 Wall. (U.S.) 650, 19 L.Ed. 320	3
McCoy v McCoy, 28 Or.App. 919, 562 P.2d 207 (1977).	4
Neilson v Lagow, 12 How. (U.S.) 98, 13 L.Ed. 909.	3
Orr v Orr, 440 U.S. 268, 59 L.Ed.2d 306 99 S.Ct. 1102.	6
State, ex rel, Juv. Dept. v Jones, 290 Or. 799, 626 P.2d 882 (1981).	4
State, ex rel, Juv. Dept. v Mayes, 33 Or.App. 411, 576 P.2d 828 (1978).	4, 5
Street v New York, 394 U.S. 576, 22 L.Ed2d 572, 89 S.Ct. 1354.	3
Williams v Kaiser, 323 U.S. 471, 89 L.Ed. 398	3

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellant opposes the Appellee's Motion to Dismiss or Affirm and herein addresses the points raised by Appellee in the Order presented in the Motion.

JURISDICTION

Appellee reformulates the question presented and suggests Appellant's Jurisdictional Statement should be treated as a Petition for Writ of Certiorari.

The Trial Court, in its opinion, clearly and unambiguously stated it found by a preponderance of evidence that Appellant would be unable to change or adjust her homelife. (p. 15, Appendix A, Jurisdictional Statement). In so doing the Court sustained against due process challenge the provisions of the Oregon Statute permitting termination of parental rights for a preponderance of evidence. With the record plain that the Court based its decision on the preponderance standard, Appellant submits it is not germane to the question of jurisdiction that the Trial Court, in an afterthought, indicated it believed it could state by clear and convincing evidence. (p. 15, Appendix A, Jurisdictional Statement).

A SUPPLEMENTAL STATEMENT OF THE CASE

Dr. McCook, a psychiatrist and witness for the Juvenile Department, testified he concluded, on the basis of a less than one hour interview, Mrs. Maffey suffers from chronic schizophrenia. (Tr. 318, 324). He further testified the prognosis for Mrs. Maffey is that there is a substantial likelihood she will experience the recurrence of an acute psychotic episode requiring extended hospitalization within one year to eighteen months. (Tr. 324-328). He added her prognosis would be significantly better if she suffered from borderline personality. (Tr. 431, 432). Dr. Ball was Mrs. Maffey's treating psychiatrist for the seven months prior to trial. (Tr. 345). He

testified Mrs. Maffey suffered from a borderline personality pattern, (Tr. 346, 347) and her prognosis was favorable enough to permit her to be an adequate parent. (Tr. 350, 363, 391). The Trial Court concluded Appellant does not suffer from chronic schizophrenia. (pp. 6, 13, Appendix A, Jurisdictional Statement). During the three years preceding trial Mrs. Maffey was hospitalized an average of one to two times per year with the longest hospitalization lasting two weeks and the average stay being three to four days. (Child's Exhibit 9). Mrs. Maffey's caseworker, Mr. Lawson, testified she "tries very hard" to be a good person, has a "very infectious laugh," does not have the "intent" to do things harmful to her children, has a "strong desire" to be a good mother, "is a good housekeeper," meets the "physical needs" of her children and the "emotional needs, somewhat." (Tr. 847, 848, 861). Mr. Lawson testified also Mrs. Maffey can function adequately with support groups present. (Tr. 897, 898). He opined such a group would be a small group willing to work with Mrs. Maffey daily, making Mrs. Maffey the "focus of a lot of energy," with one or more of the group available daily at any time with professional counseling available, with friends giving love and emotional support. (Tr. 898, 899). Three witnesses for Mrs. Maffey, all employees of the Urban Indian Program (Carole Edmo, Christine Peterson and Cecilia Fisher) testified such a group was available to Mrs. Maffey in Portland, Oregon, at the time of trial on an indefinite basis. (Tr. 910-935, 976-992, 1046-1059). A fourth witness, Phil Perillat, testified Mrs. Maffey had not had the benefit of such a group while living in Klamath Falls, Oregon. (Tr. 1080-1091). The Trial Court, in its findings, stated Mrs. Maffey could care for the physical needs of the child, but not the emotional needs. (pp. 5, 6, Appendix A, Jurisdictional Statement). The Court added it could not make its finding by a beyond a reasonable

doubt standard. (See pp. 15, 16, Appendix A, Jurisdictional Statement).

ARGUMENT

Appellee cites Durley v Mayo, 351 U.S. 277, 281 (1956) for the proposition jurisdiction in this Court does not vest when the highest court of the State delivers no opinion and it appears the judgment might have rested upon an adequate non-federal ground. Durley, supra, should not be determinative in this case.

> Whether the decision of the State Court rested on a determination of the federal question is a federal question this Court is to decide after a review of the case record.
>
> (I)t must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. (Citations omitted). Whether these requirements have been met is itself a federal question. . . That determination must rest upon an examination of the record. (Emphasis added). Honeyman v Hanan, 300 U.S. 14, 18, 19, 81 L.Ed. 476, 479.

Thus this Court has reviewed the record to determine if the State Court decision rested on an adequate state ground thereby rendering decision of the federal question unnecessary, Konigsberg v State Bar of California, 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 722, to determine whether a federal question was sufficiently and properly raised in the State Courts, Street v New York, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354, and to determine if the asserted state grounds were substantial or sufficient. Williams v Kaiser, 323 U.S. 471, 89 L.Ed. 398; Magwire v Tyler, 8 Wall. (U.S.) 650, 19 L.Ed. 320, 324, 325; Neilson v Lagow, 12 How. (U.S.) 98, 13 L.Ed 909, 914. Significantly, in the latter two cases cited, there was no opinion issued in the State Court, yet the Court reviewed the record in those cases and found the asserted state grounds insufficient.

Appellee submits a review by this Court of the record will reveal the asserted state ground to be insubstantial.

Under the State Law it is clear the Oregon Court of Appeals decided the federal question.

In Oregon appeals of parental termination cases are reviewed de novo. State, ex rel, Juv. Dept. v Jones, 290 Or. 799, 810, 626 P.2d 882 (1981). When exercising de novo review the Oregon Appellate Courts are to make an independent study of the record and to exercise their independent judgment. Hannan v Good Samaritan Hosp., 4 Or.App. 178, 187, 188, 192, 471 P.2d 831, 476 P.2d 931 (1970), Sup. Ct. review denied (1971). The exercise of their judgment is, however, limited by the requirement in certain instances that weight be given trial court findings of fact. McCoy and McCoy, 28 Or.App. 919, 923, 562 P.2d 207 (1977). Here the general rule is weight must be given the trial court's findings any time the opportunity to see and hear witnesses is important and the amount of weight depends on the degree of importance. McCoy and McCoy, supra at 924. It was in recognition of this rule that the Oregon Supreme Court stated:

> (E)ven though the appellate court hears such a case de novo, it must, as a practical matter and as in other cases subject to de novo review, give considerable weight to the findings by the trial judge who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimoney. State, ex rel, Juv. Dept. v Jones, supra at 810.

The Oregon Court of Appeals has applied this rule in a parental termination case where no serious question was raised concerning the credibility of the fifteen witnesses at trial saying the case turned on an evaluation of the mother and an evaluation of the competence of the other witnesses to evaluate the mother. State, ex rel, Juv. Dept. v Maves, 33 Or.App. 411, 415, 416, 576 P.2d 828 (1978). The case at bar is strikingly similar to Maves, supra, in that it also turns on an evaluation of the mother and competency of the witnesses to evaluate the mother.

It must therefore be assumed the Court of Appeals, while exercizing de novo review, deferred to the Trial Judge's findings as was done in the Maves case, supra, when it affirmed without opinion. The lack of a written opinion does not change this conclusion for the Maves Court noted the Courts' intention, at the time, to cease issuing written opinions on de novo review of cases wherein the principle issue is factual and then said:

> (B)y affirming a decision without opinion in such a case we are merely stating that we have reviewed the record, weighed the evidence and concur in the decision of the trial court. State, ex rel, Juv. Dept. v Maves, supra at 413.

Nor does the Court's treatment of this case as one wherein the principle issue is factual mean it failed to decide the federal question. On the contrary, on the basis of the foregoing discussion and the following it is submitted the Court must necessarily have decided the federal question.

The Trial Court, in its findings, clearly stated the evidence was insufficient to support termination under a beyond a reasonable doubt standard. (pp. 15, 16, Appendix A, Jurisdictional Statement). The Trial Judge supported this finding by a lengthy discussion of the various witnesses and his evaluation of the evidence which they gave. (pp. 2-15, Appendix A, Jurisdictional Statement). Under the existing Oregon law the Oregon Court of Appeals would have been required to "give considerable weight" to the trial judge's finding. This fact, coupled with the fact that the Oregon Court of Appeals had previously decided the federal question herein in a fashion adverse to Appellant, (See In the Matter of K.M.S., 26 Or. App. 219, 552 P.2d 578 (1976)) leads to the inescapable conclusion that the Court did decide the federal question.

> If there is ambiguity whether the State decision is based on State or federal grounds, it is open to this Court to remand to the State Courts for clarification as to the grounds of the decision.

Although this Court will not review judgments resting on adequate state grounds, nevertheless, when the record is ambiguous but presents reasonable grounds to believe the judgment may rest on the decision of a federal question, it is open to this Court to remand the case to the State Court for clarification. Orr v Orr, 440 U.S. 268, 276, 59 L.Ed.2d 306, 317, 99 S.Ct. 1102; California v Kriuda, 409 U.S. 33, 34 L.Ed2d 45, 93 S.Ct. 32 (1972); Herb v Pitcairn, 324 U.S. 117, 126, 127, 89 L.Ed. 789, 65 S.Ct. 459 (1945); Dixon v Duffy, 342 U.S. 33, 96 L.Ed. 46, 72 S.Ct. 10 (1951).

Appellant submits this matter should be remanded if this Court finds the basis for the lower Court decision to be ambiguous for clarification by the State Court of the grounds for its decision.

CONCLUSION

For the reasons stated above the Court should deny Appellee's Motion to Dismiss or Affirm. Appellant requests the Court to note jurisdiction and consolidate this case with Santosky v Kramer, 80-5889.

Respectfully submitted,

JAN L. PERKINS
Attorney for Appellant
OREGON LEGAL SERVICES CORPORATION
Klamath Falls Regional Office
432 Main Street, Suite 205
Klamath Falls, OR 97601
Telephone: (503) 884-7709